IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

WILLIAM H. MORGAN	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 08A-04-003-RFS
	)	
GERALD SWAIN, SWAIN PIT, INC., CHESTER LEE CHANEY, individually and CHESTER LEE CHANEY t/a B & C, LLC,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Upon an Appeal from a Decision of the Court of Common Pleas.
Reversed and Remanded.

Submitted: July 8, 2009
Decided: September 17, 2009

Richard E. Berl, Jr., Esquire, Smith O'Donnell Feinberg & Berl, LLP, Georgetown, Delaware 19947, Attorney for Plaintiff.

Dean A. Campbell, Esquire, Georgetown, Delaware 19947, Attorney for Defendants.

STOKES, Judge

Gerald Swain appeals a decision of the Court of Common Pleas ("CCP") dismissing his appeal for lack of jurisdiction. The lower court dismissed his appeal from a decision of the Justice of the Peace Court ("JP Court") for failure to comply with what practitioners commonly call the "mirror image rule," found in Civil Rule of the Court of Common Pleas (Civ. R. Ct. Com. Pl.") 72.3(c).[1] Having reviewed the record from both lower courts, as well as the applicable law, this Court concludes that the decision of the Court of Common Pleas must be reversed.

I. FACTS AND POSTURE

Prior to May 2005, Gerald Swain and Harry Swain owned a Delaware corporation known as Swain Pit, Inc., and were its principal shareholders. The business supplied soil from a pit near Lincoln, Delaware. The Swain pit was located adjacent to property owned by William Morgan.

In April 2005, Chester Lee Chaney formed a business called B & C Resources, LLC. In May 2005, B & C Resources, LLC purchased all stock of Swain Pit, Inc. from Harry and Gerald Swain. At closing, the parties signed the Stock Purchase Agreement as well as an Addendum, which transferred all liability of Swain Pit, Inc.,

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[1]Civ. R. Ct. Com. Pl.72.3(c) provides as follows:

Jurisdiction. An appeal to this court that fails to join the identical parties and raise the same issues that were before the court below shall result in a dismissal on jurisdictional grounds.

back to Harry and Gerald Swain. The Certificate of Dissolution of Swain Pit, Inc. was filed with the Secretary of State in August 2006.

In May 2007, Morgan filed an action in trespass in JP Court.[2] The Complaint alleged that Swain Pit, Inc. had trespassed on Morgan's land and removed some of Morgan's dirt. The named defendants included "Gerald Swain," "Swain Pit, Inc.,"

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[2] ● The plaintiff in the JP action was listed on the Complaint as:
William Morgan.
● The defendants in the JP action were listed on the Complaint as:
Gerald Swain
Swain Pit, Inc., whose agent is Gerald Swain
Chester Lee Chaney
Chester Lee Chaney t/a B&C LLC
● The JP Court's Order is captioned "William H. Morgan vs Gerald Swain"
● A certified copy of the JP Court judgment is captioned "William H. Morgan, Plaintiff vs. Gerald Swain, Swain Pit, Inc. B & C Resources LLC, Defendant vs. Harry J. Swain, Third Party Defendant."
● The caption on the Notice of Appeal to CCP lists the following appellants/defendants below:
Gerald Swain
Swain Pitt [sic], Inc.
Chester Lee Chaney
Chester Lee Chaney t/a B&C LLC
● The appellee/plaintiff below is listed on the Notice of Appeal as:
William H. Morgan
● The *praecipe* to the CCP appeal requests the Sheriff to issue summons for service on the following individuals:
William H. Morgan
Chester Lee Chaney

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"Chester Lee Chaney, individually" and "Chester Lee Chaney t/a B&C, LLC." Chester Chaney, who had been an employee of Swain Pit, Inc., filed a cross-claim against Gerald and a third-party claim against Harry Swain, based on the Addendum in which Gerald and Harry Swain assumed liability for Swain Pit, Inc.

In October 2007, a trial was held in JP Court. The record shows that the name "B&C, LLC" was changed to reflect the correct name of "B & C Resources, LLC," although there is no discussion of the correction. Exhibits were admitted that are relevant to this appeal because they show the parties' knowledge of certain facts. The documents include the Certificate of Dissolution of Swain Pit, Inc., the Certificate of Formation for B & C Resources, LLC and the Stock Purchase Agreement with the Addendum.

The Magistrate granted judgment in favor of Morgan and against B & C Resources, LLC. On the cross-claim and third-party action, the Magistrate found for B & C Resources, LLC, and against Harry and Gerald Swain because they had indemnified B & C Resources, LLC, in the Addendum to the Purchase Agreement. No judgments were made regarding Swain Pit, Inc. Thus the Magistrate ruled both for and against B & C Resources, LLC, although that entity was never formally identified as a party. This fact contributed to the events that followed.

In December 2007, Gerald Swain and Swain Pitt [sic], Inc.[3] filed a timely Notice of Appeal as Appellants/Defendants. The Notice of Appeal listed the parties as they had been listed on the original JP Court Complaint, as did the caption on the *Praecipe*. The *Praecipe* directed the Sheriff to make service upon William R. Chasanov, Esquire, as counsel for Morgan, and upon Chester Lee Chaney in his individual capacity. Thus all the parties were listed on the Notice of Appeal and the *Praecipe*, but Gerald Swain chose not to require the Sheriff's to make service on the agent of the defunct corporation, who happened to be himself. Nor did he specify that service be made on B & C Resources, LLC, distinct from Chaney. Morgan refiled his Complaint, as required by the CCP rules for a trial *de novo*, and Gerald Swain filed an Answer.

II. THE MOTION TO DISMISS

Chaney moved to dismiss, listing himself as an individual, and also trading as B & C, LLC, but again without reference to B & C Resources, LLC, (although this is the name used by the Magistrate). The motion to dismiss raised two issues: the lack of notice of the appeal to Harry Swain, the third-party defendant; and the inclusion of Swain Pit, Inc. as an appellant rather than as an appellee.

After hearing argument, the lower court was unconcerned with the first issue,

[3]None of the parties has objected to this misspelling.

finding that case law dictates that when parties are added or deleted from an action they can be added or deleted just as they had been below.[4] As to the second issue, the court granted the motion to dismiss because the parties named in the appeal were not "properly aligned."[5] William Morgan, who was the plaintiff below, was listed as the appellee, while the remaining parties, who had been defendants below, were listed as appellants, which reflects a standard alignment on appeal. The lower court's explanation was that although Swain Pit, Inc. no longer existed, it should have been listed as an appellee so that it would have received service in order to complete the requirements of Rule 72.3(c).[6] In other words, court found that lack of service on a defunct corporation created a jurisdictional defect sufficient to dismiss an otherwise properly filed action. For this sole reason, the lower court judge granted Morgan's motion to dismiss.

Gerald Swain filed a timely appeal to the Superior Court, and this is the Court's decision on that appeal.

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[4]Transcript of the Proceedings (April 16, 2008) at 26-27. Subsequent references to the transcript appear as either "Tr. at page no." simply *id.*

The Court notes that the parties to the matter currently before the Court did not challenge the lower court's ruling as to the third-party defendant.

[5]Tr. at 27.

[6]*Id.*

III. ISSUES

Gerald Swain argues that because of the irregularities in JP Court as to the parties' names, his Notice of Appeal was correct and that the CCP judge erred in finding that there was a violation of the mirror image rule. Thus Swain used the caption from the JP Court Complaint and did not require the Sheriff to make service on Swain Pit, Inc. Swain also argues that his papers show a good faith effort to include all necessary parties, and that his appeal should therefore not be dismissed because there is no prejudice to any party. Appellee Morgan argues that Gerald Swain should have included Harry Swain, Swain Pit, Inc. and B & C Resources, LLC, and there were no record irregularities sufficient to justify the omissions.

IV. STANDARD OF REVIEW

On appeal from a decision of the Court of Common Pleas, this Court's role is limited. It must be ascertained whether the trial judge's factual findings and conclusions are logically supported by the record and are legally correct.[7] The Court must accept the lower court's factual findings if they are supported by sufficient evidence.[8]

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[7] *Wyatt v. Motorola, Inc.*, 1994 WL 1427801, at *1 (Del. Super.).

[8] *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

V. DISCUSSION

The mirror image rule is set forth in Civ. R. Ct. Com. Pl. 72.3(c), which provides as follows:

> *Jurisdiction*. An appeal to this court that fails to join the identical parties and raise the same issues that were before the court below shall result in a dismissal on jurisdictional grounds.

This rule has been described as "old-fashioned and harsh,"[9] but it has also been recognized as being protective of parties' rights and obligations in the context of a trial *de novo*.[10] For this reason, Delaware courts have adhered to the rule since it was first stated 152 years ago in *McDowell v. Simpson*.[11] As the Delaware Supreme Court recently said in *Fossett v. DALCO Construction*, "[t]he rule provides for an adequate and fair hearing of the entire matter *de novo* by affording all parties to the Justice of the Peace proceeding an opportunity to argue their version of the facts, to present their view of the law's application to those facts, and to assure the *de novo* reviewing court that all relevant issues that could be presented can be heard."[12] The *Fossett* Court directed the Court of Common Pleas to adopt a formal civil rule, if it found the

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[9] *Fossett v. DALCO Construction Co.*, 2003 WL 22787844 (Del. Super. Ct.), *aff'd* 2004 WL 1965141 (Del. Supr.).

[10] *Fossett v. DALCO Construction Co.*, 2004 WL 1965141 (Del. Supr.).

[11] 1857 WL 1024 (Del. Super.).

[12] *Fossett v. DALCO Construction Co.*, 2004 WL 1965141(Del. Supr.).

rule still to be useful.[13] Rule 72.3(c) is the result.

In *Fossett,* two defendants were completely left off all filings on appeal, and the Delaware Supreme Court therefore affirmed this Court's dismissal of the action. In this case, the JP Court Complaint and to the subsequent Notice of Appeal to CCP are identical, as is the caption to the *Praecipe.* However, the *Praecipe* does not ask for service to be made on the defunct corporation, Swain Pit, Inc. and it lists Chester Lee Chaney only in his individual capacity. *See* Footnote 2.[14] The real inconsistencies are not with the parties' submissions but with the certified copy of the judgment from JP Court, which is unlike any of the other documents in terms of the parties' precise names. Under Rule 72.3(c), the appeal must "join the identical parties. . . that were before the court below."

A. Joining identical parties. This case raises the question of which parties must be named for purposes of the appeal, when there are changes or irregularities in the record. A review of the cases shows that there is no singular way to set up the appeal, despite the deceptively clear language of the Rule.

In *Biddle v. Mello*, the lower court dismissed an appeal from JP Court because the third-party defendant who appealed failed to include the original defendants in his

[13] *Id.* at 2.

[14] *See also* Opening Br., Ex. A, Justice of the Peace Complaint; Answering Br., Ex. G, Notice of Appeal, and Ex. H, *Praecipe.*

action.[15] In *Holloway v. Wheatley*, the lower court found that where the names in the Complaint and the Answer are identical to those in the original papers, the failure to make counter and cross claims is not a violation of the mirror image rule.[16] In *Gately v. Carey*, the lower court found no violation of the mirror image rule where the names were initially listed incorrectly, but the plaintiff submitted a corrected amended complaint.[17] In *Meyer & Meyer, Inc. v. Brooks,* the lower court ordered the plaintiff to amend the Complaint naming both defendants so that the case could proceed and neither defendant would be prejudiced by its dismissal.[18]

Recently several lower court judges have taken the position that the mirror image rule has no application when the party who files the appeal is the defendant below. In *Halloway*, the court held that "[w]hen the appellant is the defendant. . . its only filing obligation within 15 days of the judgment below is the filing of the notice of appeal, which vests this Court with jurisdiction. . . ."[19] Another judge has observed that the mirror image rule depends in large part on which party files the appeal.[20]

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[15]2007 WL 549908 (Del. Com. Pl.).

[16]2007 WL 3231589 (Del. Com. Pl.).

[17]2008 Del. C. P. Lexis 9 (Del. Com. Pl.).

[18]2009 WL 498537 (Del. Com. Pl.).

[19]*Holloway v. Wheatley*, at *2 (Del. Com. Pl.).

[20]*Levy's Loan Office v. Folks*, 2009 WL 1856642 (Del. Com. Pl.)

This Court takes the opportunity to affirm the validity of Rule 72.3(c) as the only appropriate means of filing for a trial *de novo* from JP Court to the Court of Common Pleas. Yet almost no rule is absolute, and the paramount requirement is to see that justice is done.[21] For this reason, there is room to correct a misspelling or, as here, to allow for inconsistencies in the record. Thus, without "good reason, such as actual or potential prejudice as a result of noncompliance, the rule should not be applied to preclude a court from possessing subject matter jurisdiction."[22] The cases above show that dismissal is appropriate where a party was left out altogether on appeal, thereby subject to prejudice. No such danger exists in this case.

B. Which parties must be joined. Neither Rule 72.3(c) nor the case law is clear as to whether joining identical parties pertains to parties in the original action or parties after any modifications or alterations at trial, as argued by Morgan. The Rule itself refers to "parties. . . that were before the court below. . . ." This language suggests that the drafters of the Rule were contemplating the garden variety case, not one such as this which included a non-existent corporation (Swain Pit, Inc.) and an entity which prevailed at trial but was never formally recognized as a party (B & C

[21] *See* Civ. R. Ct. Com. P. 1, which provides in part as follows: "These Rules. . . . shall be construed and administered to secure the just, speedy and inexpensive determination of every proceeding."

[22] *Pavetto v. Hansen*, 2004 WL 2419164, at *2 (Del. Super.).

Resources, LLC).

In this case, the original caption page of the Complaint was clear, as were the Notice of Appeal and the *Praecipe.* The documents from JP Court were inconsistent with the Complaint, without explanation, and were also internally inconsistent in terms of the parties' names. The lower court judge may have had no opportunity to sort out the hodgepodge and misses that occurred before the appeal reached his courtroom, but the dismissal of Gerald Swain's appeal must be reversed because it is legally incorrect,[23] no doubt because of the confusion of the initial proceedings leading to the appeal. The law does not require the doing of a futile act,[24] and it would be futile indeed to rest this matter on the presence or absence of a defunct corporation where the registered agent is a party.

VI. CONCLUSION

On the specific facts of this case only, the Court finds that by naming the parties on the Notice of Appeal as they appeared on the JP Court Complaint rather than as they appeared on the certified copy of the JP Court judgment, Gerald Swain did not violate the mirror image rule. Morgan, who received service as plaintiff below, refiled his Complaint and Chaney, who was also served, could have filed his

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[23] *Levitt v. Bouvier*, 287 A.2d at 673.

[24] *State v. Hearn*, 697 A.2d 756 (Del. Super. Ct. 1997).

third-party claim and cross-claim. If the name "B & C LLC" needed to be changed to "B & C Resources, LLC" that change could have been made just as it was, presumably, in JP Court, without prejudice to any party. No prejudice accrued to any party because of service not being made separately on Swain Pit, Inc. Thus the Court concludes that on these unusual facts the requirements of the mirror image rule were met on appeal to CCP.

For all these reasons, the dismissal of Gerald Swain's appeal is reversed, and matter is remanded to the Court of Common Pleas for further proceedings consistent with this Opinion.

IT IS SO ORDERED.

Judge Richard F. Stokes

Original to Prothonotary